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60,137-242; 118-3004-U

UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Knirk
Serial No.: 10/796,708
Filed: 3/9/2004
Art Unit: 3751
Examiner: Huynh, Khoa D.
Title: **Wall Mounted Bathroom Support Bars With Integral Mounting Flange**

M/S AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF

Dear Sir:

Applicant submits this Appeal Brief subsequent to the filing of the Notice of Appeal on December 1, 2005. Enclosed is a check for the Appeal Brief fee. Any additional fees or credits may be charged or applied to Deposit Account No. 50-1482 in the name of Carlson, Gaskey & Olds.

Real Party in Interest

The real party in interest in this application is H&H Tube and Manufacturing Co. Ultimately, this company is owned by Masco Corporation.

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Related Appeals and Interferences

There are no prior or pending appeals, interferences or judicial proceedings relating to this appeal, or which may directly effect or be directly effected by, or have a bearing on, the Board's decision in this appeal.

Status of Claims

Claims 1, 4 and 5 are pending, rejected and appealed.

Status of Amendments

The examiner has made some 35 USC §112, second paragraph rejections. On October 31, 2005, appellant submitted an amendment seeking only to address those rejections. The examiner refused entry.

Subject of the Claimed Subject Matter

Claim 1 may be seen as a representative claim. Claim 1 requires a bathroom support bar (20) having a central portion (22) and a pair of ends (23). The bar is formed of a hollow cylindrical, thin-walled tube material. The ends are formed integrally with the central portion. A mounting flange is formed integrally at each end. There are at least three tabs 26 extending radially outwardly from the thin wall at each end. The three tabs each include a hole (28) to receive a threaded fastener. A separate cover (24) is disposed at each end covering the holes. This basic structure is described in more detail, for instance, in paragraphs 11-13 in the specification. The integral flange simplifies the part when compared to the prior art which used separate parts.

Grounds of Rejection to be Reviewed on Appeal

1. The 35 USC §112 rejection of claims 1, 4, and 5 is appealed.
2. The 35 USC §103 rejection of claims 1, 4, and 5 as being unpatentable over U.S. Patent 6,038,714 to Guenther is appealed.
3. The 35 USC §103 rejection of claims 1, 4, and 5 over the combination of the U.S. Patent 872,689 to Sarkisian in view of Guenther is contested.

Arguments

A. **Rejections Under 35 USC §112, Second Paragraph.**

The examiner argues that claim 1 has a recitation of “said holes” and lacks antecedent basis. The examiner then argues that this renders the claim indefinite. This rejection is not understood, in that prior to the limitation of “said holes,” the claim recites that there are three tabs “including a hole.” Thus, the claim is definite in requiring three tabs, each tab including a hole. Thus when the claim recites “said holes,” it is quite clear what is being recited. This rejection should be reversed. Notably, appellant has attempted to amend the claim even though the examiner’s rejection is improper. The examiner has refused entry of the amendment, even though the amendment solely sought to reduce the issue for appeal.

The examiner rejects claim 5 as being indefinite in that the claim says that there are three tabs “each including holes.” Perhaps the claim would have been better drafted to say each tab includes “a hole.” Appellant’s unentered amendment attempted to make this change. However, this limitation certainly does not render the claim indefinite. One can easily understand what is meant by the claim, and this rejection should also be reversed.

The case law relevant to a proper holding of indefiniteness requires that the claim truly cannot be understood. Clearly, that burden is not met here.

B. Rejection Over Guenther.

The Guenther patent does not disclose three tabs. Instead, Guenther has a separate mounting flange welded to the bar material. One main inventive benefit of appellant's claimed disclosure is that a single, thin-walled member can form the mounting flange without the requirement of attaching any other structure.

Thus, Guenther does not disclose the three tabs required, nor is its mounting structure formed integrally with the wall. The examiner acknowledges that Guenther does not show three tabs. The examiner argues that modifying Guenther to include three tabs with holes for receiving a fastener "would be considered a mere choice of a preferred mounting configuration." The examiner points to U.S. Patents 3,098,240 and 2,455,606 as evidence of the use of more than two fasteners. Apparently the examiner believes that by merely modifying Guenther to utilize a third fastener, the claim would be met. However, the claim would not be met by merely including a third fastener. Instead, what is required is three separate tabs. Guenther does not meet this limitation.

Importantly, an examiner is not allowed to speculate about "mere choice" of anything. Instead, the examiner must rely upon prior art. This rejection is improper and should be reversed.

While these distinctions may seem fine, it must be remembered that this is an extremely narrow art. Appellant has invented and claimed distinctions over the prior art, and is entitled to allowance of these claims.

C. The Rejection of the Claims Over Sarkisian Combined With Guenther is Improper.

Sarkisian discloses a curtain rod. As is known, curtains rod a curtain, and the ends are concealed by the curtain. Sarkisian has two tabs, not three. It would appear since Sarkisian appears to be mounted near a window or frame (W), that having two of its flat portions or feet (b) is all it would want. To add a third would be to require structure that might well extend toward the window, and off of the frame (W). Thus, Sarkisian does not meet even the basic structural limitations required by the claim. The examiner then alleges that Guenther discloses a cover that would be obvious to include into Sarkisian. It would not have been obvious to include a cover into Sarkisian. Sarkisian is already covered by its curtain. There would be no benefit to including a separate cover, and no suggestion to do so.

Simply, this rejection is improper.

While these distinctions may seem fine, it must be remembered that this is an extremely narrow art. Appellant has invented and claimed distinctions over the prior art, and is entitled to allowance of these claims.

Conclusion

For the reasons set forth above, the rejection of all claims is improper and should be reversed. Appellant earnestly requests such action.

Respectfully submitted,

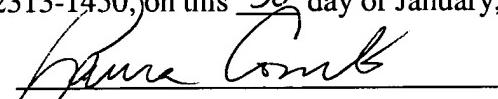


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Dated: January 30, 2006

CERTIFICATE OF MAIL

I hereby certify that the enclosed Response is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 30 day of January, 2006.


Laura Combs

CLAIMS APPENDIX

1. bathroom support bar comprising:

a bar having a central portion extending along a first direction between a pair of ends, said ends being bent away from said bar central portion; and

said bar being formed of a hollow thin walled tube material, with said ends being formed integrally with said central portion, and a mounting flange formed integrally at each said end and including a plurality of tabs extending radially outwardly from said thin wall at each said end, with there being at least three of said tabs in each mounting flange, and said at least three of said tabs including a hole to receive a threaded fastener, and a separate cover disposed at each said end to cover said holes.

4. A support bar as set forth in claim 1, wherein said bar is cylindrical.

5. A bathroom support bar comprising:

a bar having a central portion extending along a first direction between a pair of ends, said ends being bent away from said bar central portion;

said bar being formed of a hollow cylindrical thin walled tube material, with said ends being formed integrally with said central portion, and a mounting flange formed integrally with each end and including a plurality of tabs extending radially outwardly from said thin wall at said ends, and there being at least three of said tabs in each said mounting flange, with said at least three of said tabs each including holes to receive a threaded fastener; and

a separate cover disposed at each of said ends and covering said holes.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.